LIBRARY

Office-Supreme Court, U.S.
FILED
NOV 19 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 25

CLAUDE DENNIS, *Petitioner*,

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, a corporation, *Respondent*.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DENNIS MCCARTHY,
CLIFFORD L. ASHTON,
GRANT MACFARLANE, JR.,
Counsel for Respondent
Suite 300,
65 South Main Street
Salt Lake City, Utah

TABLE OF CONTENTS

	Page
OPINION BELOW	1
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	2
ARGUMENT	4
POINT I.	
THIS IS NOT A PROPER CASE FOR CERTIORARI REVIEW	4
POINT II.	
THE UTAH SUPREME COURT DID NOT ERR IN HOLDING THAT THERE WAS NO EVIDENCE OF NEGLIGENCE ON THE PART OF THE RAILROAD COMPANY	6
POINT III.	
THE UTAH COURT DID NOT MISCONCEIVE OR MISAPPLY THE FEDERAL EMPLOYERS' LIABILITY ACT	12
CONCLUSION	13

Cases Cited

Anderson v. Atchisin T. & S. F.R. Co., 333 U. S. 821, 68 S. Ct. 854, 92 L. Ed. 1108	10
Bailey v. Central Vermont R. Co., 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444	4
Brady v. Southern Ry. Co., 320 U.S. 476, 64 S. Ct. 232	6
Butz v. Union Pacific R. Co., 120 Utah 185, 232 P. 2d 332	5

TABLE OF CONTENTS—(Continued)

Page

Lemmon v. Denver and Rio Grande Western R. Co., 9 Utah 2d 195, 341 P. 2d 215 5

Maxfield v. Denver and Rio Grande Western R. Co., 8 Utah 2d 183, 330 P. 2d 1018 5

Mooney v. Denver and Rio Grande Western R. Co., 123 Utah 224, 257 P. 2d 947 5

New York, New Haven & Hartford R. R. Co. v. Henagan, 364 U.S. 441, 81 S. Ct. 198 6

Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 ..... 4-5, 10

United States v. Johnston, 45 S. Ct. 496, 268 U.S. 220 5

Wheat v. Denver and Rio Grande Western R. Co., 122 Utah 418, 250 P. 2d 932 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 535

CLAUDE DENNIS, *Petitioner,*

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, a corporation, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion below is published at 372 P. 2d 3. An amended opinion has not yet been reported but is attached to petitioner's brief.

QUESTIONS PRESENTED

In opposition to the Petition for Writ of Certiorari the respondent respectfully presents the following propositions:

POINT I.

THIS IS NOT A PROPER CASE FOR CERTIORARI REVIEW.

POINT II.

THE UTAH SUPREME COURT DID NOT ERR IN HOLDING THAT THERE WAS NO EVIDENCE OF NEGLIGENCE ON THE PART OF THE RAILROAD COMPANY.

POINT III.

THE UTAH COURT DID NOT MISCONCEIVE OR MISAPPLY THE FEDERAL EMPLOYERS' LIABILITY ACT.

STATEMENT OF THE CASE

On January 2, 1962, two "open joints" were reported to the respondent railroad company on its main line near Green River, Utah (R. 221). Green River is one of the most remote areas of respondent's line. The two available section crews residing in the vicinity were immediately dispatched, one to each joint, to make immediate repair. Petitioner was a member of one of those crews. He claims damages for frostbite which occurred during the repair operations.

In railroading an "open joint" is considered an emergency which must be corrected immediately (R. 229). Since the track where the repairs were being made was the main line, it had to be kept open for service during repair. This was done by placing a small piece of rail (dutchman) in the opening over which trains passed at reduced speeds until the joint was closed. The use of a dutchman is strictly a temporary measure. Until the joint is closed and per-

manently secured, the "open joint" (even with dutchman inserted) presents a threat of derailment (R. 229-230) and seriously slows and impedes rail traffic (R. 231).

Petitioner and his fellow sectionmen left Green River about 5:30 o'clock p.m. on the night of January 2 and traveled approximately 18 miles to the repair site (R. 197). Upon arriving at the site with the truck, the men split up a tie and built a fire (R. 136). When this fire burned out, the men built another (R. 148). During the course of repair operations the men would go over to the fire to warm themselves when they felt cold (R. 212). Petitioner testified that he was free to go over to the fire if he got cold (R. 148, 149). Petitioner was not as warmly dressed as the other members of the crew. He was the only one who was not wearing overshoes or woolen mittens (R. 132, 133). In place of woolen mittens he wore a rubberized glove with a canvas glove beneath it. Petitioner testified that it was his obligation to furnish clothing adequate for the occasion (R. 133, 149) and that he provided himself with what he figured was adequate to protect him against the cold (R. 133).

Petitioner intermittently worked on the line and warmed himself by the fire. He testified that at about midnight he had some difficulty in separating his fingers to get his glove off and that he remarked, "It looks like my hand's frozen to that wrench" (R. 108). This is the only remark which petitioner claims to have made about his hand or fingers while he was on the job. Petitioner further testified that he continued to work until about 4:00 o'clock a.m. and that the crew then returned to Green River about 5:00 o'clock a.m. (R. 111).

Petitioner's counsel called Dr. Reed Clegg, who testified on hypothetical facts that petitioner had suffered from frostbite. On cross examination, Dr. Clegg testified that

inadequate clothing, and in particular cold feet, would contribute to lowering of body temperature and thus to frostbite on vulnerable members of the body (R. 165). He further testified that adequate clothing can protect against any weather condition (R. 163, 164).

At the close of the petitioner's case the respondent moved the court for a directed verdict on the ground that there was no evidence of negligence on the part of the railroad company and that the undisputed evidence demonstrated that the sole cause of petitioner's frostbite was his own failure to properly clothe and protect himself from the cold. The court denied this motion and subsequently denied respondent's motion for judgment notwithstanding the verdict. On appeal the Supreme Court of Utah reversed.

ARGUMENT

POINT I.

THIS IS NOT A PROPER CASE FOR CERTIORARI REVIEW.

As a preface to its review of the evidence the Utah Supreme Court in its opinion said:

> "... there must be a policy of extreme liberality in allowing the issues in such cases [FELA cases] to be determined by a jury; and ... if there is any evidence whatsoever to justify a reasonable belief that the railroad failed to exercise such precautions as reasonable care and prudence would dictate under the circumstances, the verdict must be sustained...." (372 P. 2d 3, 5)

The Utah court took express recognition of the principles laid down by this court in *Bailey* v. *Central Vermont R. Co.*, 319 U.S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444, and *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed.

2d 493. Upon a painstaking review of the record the court concluded that the evidence and inferences to be drawn therefrom were insufficient to present a jury issue as to the negligence of the respondent.

There is no basis whatever for any claim that the Supreme Court of Utah has displayed hostility to enforcement of the governing rules of the Federal Employers' Liability Act. On the contrary, the Supreme Court of Utah has demonstrated an understanding of the Act and its liberal interpretation and has shown a willingness, if not an eagerness, to enforce the rules laid down by this court.

See e.g.:

Butz v. *Union Pacific R. Co.*, 120 Utah 185, 232 P. 2d 332;

Mooney v. *Denver and Rio Grande Western R. Co.*, 123 Utah 224, 257 P. 2d 947;

Wheat v. *Denver and Rio Grande Western R. Co.*, 122 Utah 418, 250 P. 2d 932;

Maxfield v. *Denver and Rio Grande Western R. Co.*, 8 Utah 2d 183, 330 P. 2d 1018;

Lemmon v. *Denver and Rio Grande Western R. Co.*, 9 Utah 2d 195, 341 P. 2d 215.

The only matter at issue here is whether or not the lower court has properly appraised the facts of the case. Petitioner contends that it has not. Respondent urges that the lower court's appraisal will withstand the most rigorous requirements laid down by this court.

In *United States* v. *Johnston*, 45 S. Ct. 496, 268 U.S. 220, this court said:

> "We do not grant a certiorari to review evidence and discuss specific facts."
>
> (45 S. Ct. 496, 497, 268 U.S. 220, 227)

Respondent respectfully submits that there are no "special and important" reasons for granting a certiorari in this case as contemplated by the 19th rule of this court.

POINT II.

THE UTAH SUPREME COURT DID NOT ERR IN HOLDING THAT THERE WAS NO EVIDENCE OF NEGLIGENCE ON THE PART OF THE RAILROAD COMPANY.

An employee's right to compensation under the Federal Employers' Liability Act is predicated on employer negligence. In the absence of an evidentiary basis for a finding of employer negligence it is the duty of an appellate court to set aside a verdict for the employee.

Brady v. *Southern Ry. Co.*, 320 U.S. 476, 64 S. Ct. 232;

New York, New Haven & Hartford R.R. Co. v. *Henagan*, 364 U.S. 441, 81 S. Ct. 198.

While fault remains the basis of railroad liability, the duty of an appellate court to protect the right of the railroad against unfounded jury verdicts is just as important as its duty to preserve the employee's right to a verdict where there are probative facts to support it.

Petitioner proceeds upon the assumption that the railroad company has a duty to protect him from "any and all sorts of harm" (Page 5, Petitioner's Brief).

Petitioner has represented to this court that his injury was the result of exposure to cold while in the course of a "routine" repair performed under the supervision of a domineering foreman who had failed to obtain the necessary help of other available men. This contention is founded upon a complete distortion of the evidence.

The repair of an open joint is considered by the railroad industry to be an emergency operation and not a "routine" repair (R. 229). The threat of derailment on a main line requires the immediate action of a section crew and their continued effort until a permanent repair is effected. The use of a dutchman is a necessary expedient to keep trains moving at reduced speeds during repair operations, but may not be employed as a repair measure because of its tendency to turn out of alignment and be caught by the wheels of the train (R. 230). In addition to the threat of derailment, the open joint with dutchman inserted seriously slows and impedes rail traffic (R. 231). In this case the joint was on respondent's main line which carried scheduled passenger trains and several high speed freight trains, delay of which affected traffic on the entire intercontinental line (R. 224-226). This was not a "routine" repair.

Nor was there any evidence whatever that petitioner failed to avail himself of available warming facilities because of the words or conduct of the foreman or of any other employee. Petitioner testified that he was free to go to the fire when he got cold (R. 148, 149). Other members of the crew went to the fire whenever they got cold (R. 212). Petitioner did not testify that he felt any supervisory restraint or moral compulsion which prevented his use of the fire on more frequent occasions during the work shift.

The statement of petitioner's counsel that "a track maintenance crew worked out of Cedar, Utah but was not called" (Page 6, Petitioner's Brief) is also incorrect. The evidence disclosed that two open joints were reported on the same day and the Cedar crew was dispatched to close one of these joints (R. 223). This crew was engaged in the same emergency operation as petitioner's Green River crew. All available men in the isolated area of the open joint were pressed into service to complete the repair.

Petitioner's counsel list on pages 14 and 15 of their brief various things which might have been done to protect petitioner from the cold. Most of these "ideas" have been conceived since the decision of the Utah Supreme Court.

The contention that an additional crew should have been provided is inconsistent with the evidence. There was no additional crew available in this remote area to assist in the emergency operation. Petitioner's only effort to prove availability of additional help was his statement that one Delmar Powell of Green River could have been called to help. The evidence shows that he was called by the foreman but could not be contacted (R. 196). Furthermore, the evidence showed that the four-man crew who worked on the joint in this instance was as large a crew as ever required to reduce an open joint and that in isolated areas it was common to do such work with two or three men (R. 233, 234). The elements of necessity, notice and opportunity were absent. Finally, there is no evidence whatever to support the conclusion that insufficient help was the cause of petitioner's frostbite or that the work could have been done more safely with additional help.

Petitioner next suggests that the job should have been postponed until morning. This argument ignores the duty of the respondent to maintain its line in safe condition for its employees and the passengers and property it transports. Petitioner admitted that at least six trains would pass during the night (R. 120). Each would be subject to the delay and possibility of derailment attendant the presence of an open joint or dutchman. Petitioner has no answer for the Utah Supreme Court's observation that:

> "To hold the defendant negligent not to have left it [the dutchman] in all night would require an action that according to the evidence would almost certainly have been considered negligence if any mishap had occurred as a result of leaving

> it in for any longer than was absolutely necessary." (372 P. 2d 3, 7)

The respondent not only acted reasonably in proceeding with immediate repair, but it had a duty to do so.

The same comment is applicable to petitioner's contention that the crew should have worked a short shift and then returned the next morning. Respondent was required to reduce the joint as soon as possible.

The suggestion that the crew could have been taken to Green River for an hour's warming is nothing but a hollow afterthought. The heater in the truck and the fires built of ties were available and were actually used by the members of the crew when they became cold. Petitioner's contention that he should have been sent back to obtain additional clothing is in the same category. He acknowledged his responsibility to provide his own clothing for the job; testified that he was the best judge of his needs; that he thought he was dressed warmly enough and that he made no complaint about inadequate clothing. The final contention made by petitioner is that he should not have been sent 300 yards to get the truck during the repair operations. Petitioner assumes here that the walk to the truck and return in the heated cab enhanced the chances for frostbite and that the respondent was therefore negligent in sending petitioner as opposed to another employee. Both assumptions are unsupported by evidence or reason.

Petitioner goes to great lengths to attempt to show that the Utah Supreme Court inappropriately resolved facts and misconceived the law. Sentences of the opinion are isolated and attacked. The explanation for the divergence in the court's statement of the facts and the position of petitioner's counsel is that counsel rely upon petitioner's

state of mind (which he did not communicate or testify to), inferences to be drawn from testimony not offered, and distortion of the evidence received. The attempt to show misconception of the law is founded upon such things as niceties of the word "conjecture" and the claimed improper distinction of the *Rogers* case. The statements of the court taken in context demonstrate that the court's concept of the law is correct.

The only case cited by petitioner dealing with exposure to weather is *Anderson* v. *Atchisin T. & S. F. R. Co.*, 333 U.S. 821, 68 S. Ct. 854, 92 L. Ed. 1108. The evidence in that case disclosed that the railroad employee (a train conductor) fell from a train and injured himself. In his helpless condition he was exposed to bitter cold weather over a period of several hours which resulted in his death. This court held that the train employees could be found negligent in failing to make efforts of any kind to ascertain and save him from his probable peril. The case has no bearing on the facts of the instant case.

At page 23 of their brief petitioner's counsel cite state and circuit court decisions to show that the Utah court erred in its statement that the railroad has no duty to supervise the attire of its employees. These cases pertain to special safety equipment such as goggles, helmets, respirators and life saving equipment. None of them hold that the railroad is responsible for the clothing worn by its employees. If petitioner makes the claim that the respondent is responsible for his attire, it is another claim that has been fashioned by him since the opinion below. At the trial petitioner testified (R. 133):

> "Q. Now in this kind of work you men furnish your own clothing, do you not?
>
> A. That's right.

Q. And that is the custom and practice on the railroad for sectionmen to furnish all of their own clothing?

A. Yes.

Q. So you yourself provide yourself with what you think is sufficient clothing to protect you against the cold?

A. Yes, sir."

And again (R. 149):

"Q. ... You sectionmen accept the responsibility of clothing yourself for the kind of weather you are exposed to on the particular railroad job?

A. We furnish our own clothes, yes.

Q. And it is the custom and practice and has been ever since you have worked for the railroad for you men to do that yourself?

A. Yes, sir."

Petitioner testified that he thought his clothing sufficient and that no one cautioned him to the contrary (R. 132, 133). He was the only member of the crew without woolen mittens and overshoes (R. 132, 133).

The explanation for the petitioner's frostbite does not lie in the tenuous claims of employer negligence conjured up by his ingenious counsel. The testimony of petitioner's physician, called as his own witness, furnishes the answer (R. 163, 164):

"Q. Doctor, I appreciate that cold is what causes frostbite and the common protection against cold is adequate clothing is it not, doctor?

A. Yes, sir.

Q. You certainly would think it would be reasonable to assume that people could protect themselves by adequate clothing against a temper-

ature of five degrees above zero and five degrees below, would you not, doctor?

• • •

A. Well, I would say that no matter how cold it gets, if you have sufficient clothing this should be protection against it."

POINT III.

THE UTAH COURT DID NOT MISCONCEIVE OR MISAPPLY THE FEDERAL EMPLOYERS' LIABILITY ACT.

Under Point II of his brief petitioner asserts that the Utah Supreme Court set aside his verdict by "resort to the simple expediency of calling contributory negligence, in effect, 'sole proximate cause'" (Page 30, Petitioner's Brief). It is difficult to follow this argument in light of the fact that the greater part of petitioner's brief is devoted to the proposition that the Utah Supreme Court erred in holding that there was no evidentiary basis for a finding of employer negligence. The holding of no employer negligence compelled reversal without any consideration of contributory negligence and its causal connection with the injury. Neither the issue of contributory negligence nor the doctrine of sole proximate cause were discussed in the opinion of the Supreme Court of Utah.

Under Point III of his brief petitioner asserts that the doctrine of assumed risk was revived to defeat his recovery. The Utah Supreme Court has not held that petitioner's recovery is barred by his own conduct. It is nowhere suggested that the railroad has a defense to this action because of anything done or omitted by petitioner. The court below has simply held that there are no probative facts showing

employer negligence. In the concluding paragraphs of its opinion the lower court said:

> "Notwithstanding the broad prerogatives of the jury in this case in determining the standard of reasonable care, where it appears that the railroad acted in good faith and exercised its judgment as to the proper course to follow; and there is no evidence of failure to use reasonable care in doing so, the jury cannot be allowed to second guess the judgment of management and impose liability upon the railroad simply because a mishap such as the one of concern here occurred."
>
> (372 P. 2d 3, 7)

Point III of petitioner's brief is simply an attempt to write something into the lower court opinion to justify a basis for argument.

CONCLUSION

The opinion of the Supreme Court of Utah reflects a conscientious effort to canvass the facts in light of the decisions of the United States Supreme Court. It is respectfully submitted that the analysis made by the Utah court will withstand the most rigorous tests laid down by the decisions construing the Federal Employers' Liability Act. There is no evidence or indication whatever of state court disrespect or hostility to the Federal Employers' Liability Act or the decisions of this court. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

DENNIS MCCARTHY
CLIFFORD L. ASHTON
GRANT MACFARLANE, JR.
Counsel for Respondent